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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 669

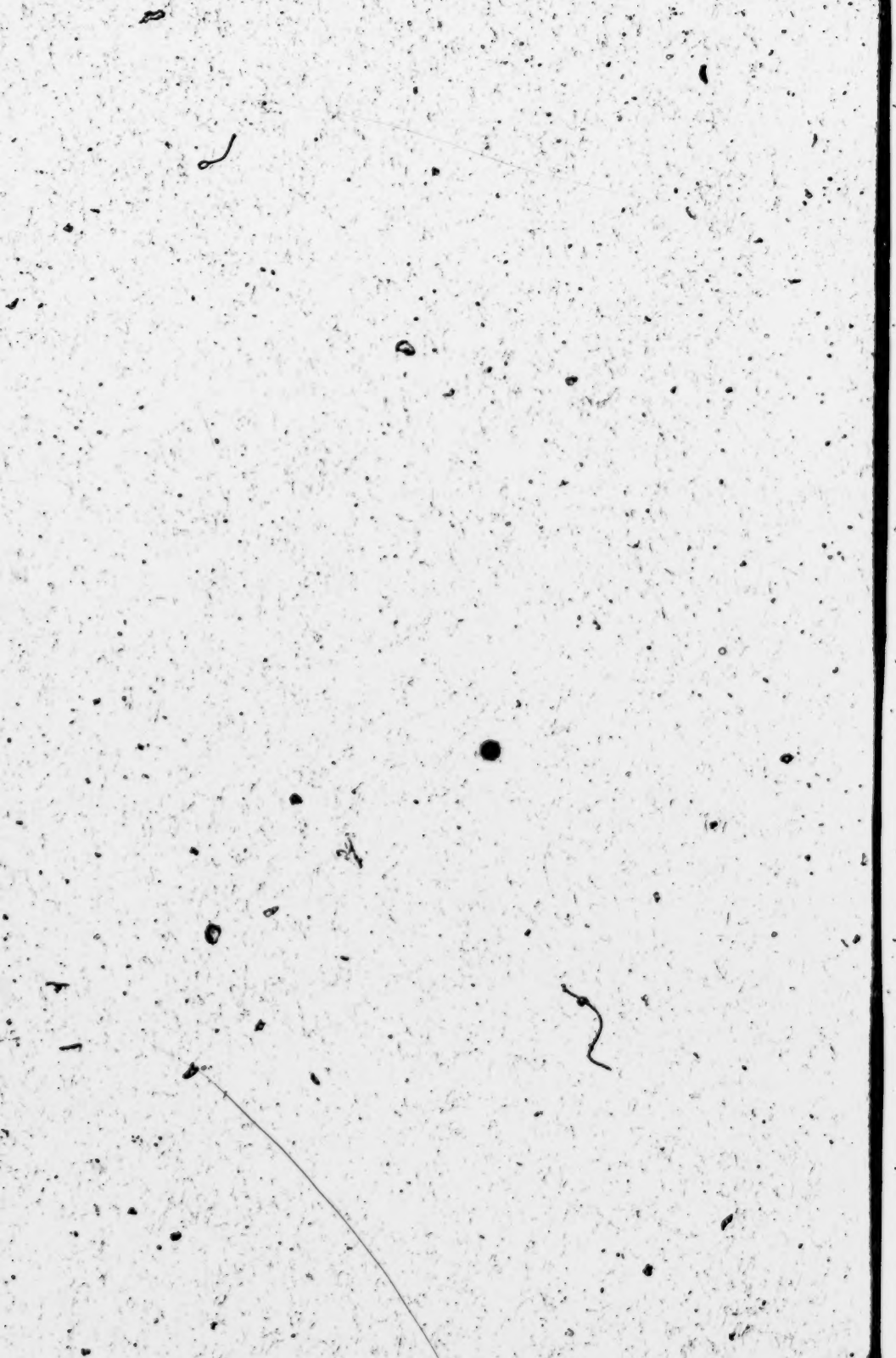
JOHN N. MINNICH, PETITIONER,

vs.

RUSSELL GARDNER, ET AL., INTERVENING CREDITORS, AND D. C. REILEY, ESQ., TRUSTEE OF KING MOTOR CO., BANKRUPT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HENRY GEORGE GRESS,
Counsel for Petitioner.



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SUPREME COURT OF THE UNITED STATES

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RUSSELL GARDNER, ET AL., INTERVENING CREDITORS, AND D. C. REILEY, ESQ., TRUSTEE OF KING MOTOR CO., BANKRUPT, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, John N. Minnich, respectfully represents:

1. That on March 21, 1929, your petitioner entered a judgment against the King Motor Company, a corporation, in the Court of Common Pleas of Bedford County, Pennsylvania. On March 26, 1929, petitioner caused execution to be issued upon the judgment and the writ was received by the sheriff on that day (R. 13, 32). The writ was returnable the third Monday of April, 1929 (R. 13, 32). On March 27, 1929, the sheriff levied upon the personal property of the King Motor Company and indorsed his levy upon the writ (R. 13, 33).

By the law of Pennsylvania a levy indorsed on a writ of execution before the return day thereof is a lien from the

time the writ was received by the sheriff until divested by subsequent sale, and it is text law that a sheriff may sell on an execution after the return of his writ.

2. The sheriff did not sell before the return day of the writ and returned the writ on April 15, 1929, "goods on hand not sold" (R. 13, 34). On April 18, 1929, petitioner caused a writ of *vend. ex.* to be issued (R. 13, 34); on September 4, 1929, an alias writ of *vend. ex.* (R. 13, 36); and on November 13, 1929, January 22, 1930, and April 30, 1930, pluries writs of *vend. ex.* (R. 13, 36). Each of these writs, except the last which was in the sheriff's hands at the time of the filing of the petition in bankruptcy hereinafter referred to, was returned either with the endorsement "goods on hand not sold, writ not executed for want of time," or "goods on hand not sold" (R. 13, 36).

The writs of *vend. ex.* created no new liens because, in Pennsylvania, a writ of *vend. ex.* is a secondary writ which creates no new lien on personal property; it is simply the writ under which the sheriff sells by virtue of the levy on a previous writ. It is proper where personal property is levied upon and the writ returned by the sheriff, goods on hand not sold, to issue a *vend. ex.* directing the sheriff to sell.

3. The petitioner did not enter into any agreement with the defendant nor did he in any way interfere with these several writs (R. 27, 29, 30). It is conceded, however, that under the law of Pennsylvania on account of the delay of almost seventeen months, apparently acquiesced in by the petitioner, the execution became dormant, and the lien would have been postponed to other executions subsequently issued while the dormancy continued. No executions were issued, no receiver was appointed, and no petition in bankruptcy was filed during the dormancy.

4. *On August* 21, 1930, *the petitioner instructed the sheriff to advertise for sale the goods of the King Motor Company which had been levied upon on March* 27, 1929, *and to sell the same immediately* (R. 14, 20, 29). *On the same day, to wit, August* 21, 1930, *the sheriff advertised the goods for sale* (R. 14, 20, 29, 38). *The sale was to be held on August* 29, 1930 (R. 38).

By the law of Pennsylvania, by general law, and by the law as laid down by at least two Circuit Courts of Appeals, the instructions given by the petitioner to the sheriff to proceed and the positive action of the sheriff advertising the sale of the property revived the priority of petitioner's lien. That revival was not of the lien but of its priority and dated back to the time of the levy. No new lien was created at this time which would be void because within the four month period under Section 67 (*f*) of the Bankruptcy Act.

5. From the time of entering of the judgment on March 26, 1929 (R. 13, 32), until over two months after the issuing of the last *vend. ex.* on April 30, 1930 (R. 13, 36), the defendant in the execution was solvent. The defendant was insolvent for a period of thirty to forty-five days preceding August 25, 1930 (R. 28), or, in other words, not earlier than July 11, 1930.

6. On August 25, 1930, a receiver in equity was appointed by the Court of Common Pleas of Bedford County, Pennsylvania, and the writ of the petitioner was ordered stayed by the court until the final determination of the matter (R. 15, 39). By the law of Pennsylvania the lien of the levy continued by operation of law.

7. On August 30, 1930, an involuntary petition in bankruptcy was filed against the King Motor Company (R. 1)

which was adjudged a bankrupt on September 19, 1930 (R. 16), and a trustee in bankruptcy was appointed (R. 16).

By the bankruptcy law as interpreted by this Court, the trustee taking under the rights of an execution creditor as of the date of filing of the petition in bankruptcy, and not earlier, took the property of the King Motor Company subject to the lien of the petitioner's levy thereon existing for more than four months before.

8. Written notice was given the trustee that petitioner had a lien upon the personal property of the King Motor Company by virtue of the levy of March 27, 1929, and that it should be sold separate and apart from other property of the bankrupt (R. 16, 29, 30). After the appraisement of the personal property the referee held a meeting, which was attended by one of the counsel for the wage claimants and others, and the articles upon which the sheriff had levied on March 27, 1929, were marked, separated and listed separately from those which had not been levied upon (R. 16, 30). The personal property consisted mostly of tools, machinery, furniture and fixtures, being principally the equipment of a large garage, as is shown by the levy of the sheriff endorsed on the writ (R. 33). It was agreed at a meeting of the creditors to sell the property, upon which the petitioner had a lien, separate from the other property of the bankrupt. All of the personal property of the company was sold by the piece, but only one sale list was kept. The trustee and petitioner with the referee and other creditors went over the sale list, comparing it with the separated inventories, to separate the selling prices of the articles upon which the petitioner had a lien from those upon which he did not; and it was agreed by the trustee and the petitioner, after the comparison, that fifty per cent of the sale, or $1,776.17, represented the value of

the property upon which the petitioner had a lien (R. 17, 30).

9. The referee awarded the agreed amount of $1,776.17 less $18.38, the costs which would have been necessary if the goods had been sold by the sheriff, or $1,757.79, to the petitioner under his lien (R. 17, 21), holding that the petitioner had a valid lien more than four months old upon the personal property levied upon on March 27, 1929, and that, if the lien had become dormant, its priority had been revived by the petitioner directing the sheriff to sell and by the advertisement of the sale (R. 20).

10. Upon the referee's certificate for review (R. 40-41-42-43), the district court of the United States for the Western District of Pennsylvania decreed that the writ of execution did not entitle the petitioner to valid liens against the fund, nor to any distribution in preference to the priority wage claims (R. 46). No opinion was filed by the district court.

11. Your petitioner appealed to the United States Circuit Court of Appeals for the Third Circuit from said order disallowing said liens (R. 48). After consideration, that court, on July 12, 1933, affirmed the decree of the district court (R. 53).

12. In the opinion filed by the circuit court an error existed in the chronology of the proceedings as detailed in the statement of facts. The court stated: "The sheriff advertised on August 29, 1930." This placed the advertisement four days after the appointment of a receiver. The correct date of the advertisement by the sheriff is August 21, 1930 (R. 14, 20, 29, 38), four days before the receiver was appointed (R. 14, 39) and nine days before the involuntary petition in bankruptcy was filed (R. 1).

13. Thereupon, on August 2, 1933, the petitioner filed a petition for rehearing (R. 55), specially calling the court's attention to the error in the chronology of the facts. He also called the court's attention to the fact that the facts of the case at bar, corrected, are precisely similar to those of *In re Zeis*, 245 Fed. 737, a case wherein the decision of the Circuit Court of the Second Circuit and the decision of the circuit court in the case at bar are in direct conflict. The petition for rehearing was denied on October 2, 1933 (R. 59).

14. Upon the petitioner's request to file a petition praying for a correction of the facts, the court accepted the correction and the record has been certified with the correct date, to wit: "The sheriff advertised on August 21, 1930." (The advance sheets of the Federal Reporter give the date incorrectly.)

Your petitioner, by the decree of the Circuit Court of Appeals for the Third Circuit, if the same shall not be corrected, will be deprived of a lien upon the proceeds of the personal property aforesaid, which lien exists by virtue of the levy of March 27, 1929, made by the sheriff more than four months before the petition in bankruptcy was filed against the King Motor Company; and which lien, if dormant, had been revived nine days before the filing of the petition.

Your petitioner says that the ruling of the circuit court of appeals is contained in the following paragraph of the opinion:

> "A lien claimant undoubtedly is entitled to rebut the presumption of want of good faith. Under the facts, we reach the conclusion that the appellant, the lien claimant here, made his levy solely for the purpose of acquiring a lien and without a genuine intention of proceeding promptly for the collection of his

debt. He postponed all action until such time as the debtor was obviously insolvent and within four months of the bankruptcy. He has not met the test of good faith and has therefore failed to establish liens upon the funds."

Your petitioner further says that even if the conclusion of the circuit court, that "the lien claimant here, made his levy solely for the purpose of acquiring a lien and without a genuine intention of proceeding promptly for the collection of his debt," is admitted, still the lien was not void. It was good against the defendant in the execution from the date of its issue until the petition in bankruptcy was filed. The execution was dormant and would have been postponed to other executions subsequently issued while the dormancy continued; but no executions were issued, no receiver was appointed, and no petition in bankruptcy was filed during the dormancy.

Your petitioner further says that even if the finding of the circuit court, that "He postponed all action until such time as the debtor was obviously insolvent and within four months of bankruptcy," be admitted, still it does not avoid either the lien or the revival of the priority of the lien. The debtor was solvent when the lien was obtained more than four months prior to the filing of the petition in bankruptcy. A lien obtained through legal proceedings must have been acquired within the four month period immediately preceding the filing of the petition in bankruptcy to be affected by insolvency. The action taken was the directing of the sheriff to proceed and the advertisement by the sheriff. This created no new lien—it only revived the priority of the lien created seventeen months before. The enforcement, within the four month period, of an existing lien is not denounced by the Bankruptcy Act.

Your petitioner further says that the circuit court of appeals, under the facts of this case, should have found and

held that your petitioner's lien had been acquired more than four months prior to, and, though dormant, had been revived nine days before, the filing of the petition in bankruptcy and was effective against the trustee in bankruptcy. This question has not been passed upon by this Court so far as we are advised. It has been passed upon by the Circuit Courts of Appeals for the Second and Seventh Circuits. The decisions of those courts are in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in this case, and it is in the interest of jurisprudence and uniformity of construction and application of the Bankruptcy Act, that the question be finally determined by this Court.

Your petitioner further says that the rulings made by the Circuit Court of Appeals are in conflict with the applicable local decisions of the Supreme Court of Pennsylvania, in conflict with general law, and in conflict with the decisions of the Federal Courts.

Your petitioner further says that the Circuit Court of Appeals has misconstrued and misapplied the Federal Bankruptcy Act in making the decision herein sought to be reviewed.

The question of local, general, and federal law thus presented in this case are of much importance, and of such character that it is probable that they will arise in other cases. Those questions have never yet been passed upon by this Court so far as we have been able to ascertain. For these reasons, as well as to remedy the wrong done to your petitioner, a writ of certiorari should issue in this case.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Third Circuit, commanding that court to certify and to send

for this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 5088, John N. Minnich, appellant, *vs.* Russell Gardner, *et al.*, Intervening Creditors, and D. C. Reiley, Esq., Trustee of King Motor Co., Bankrupt, Appellee, to the end that said case may be reviewed and determined by this Court, as provided by law, and that the judgment of said circuit court of appeals may be reversed by this Court, and that your petitioner may have such other and further relief or remedy as may be just.

JOHN N. MINNICH,
Petitioner.

HENRY GEORGE GRESS,
Counsel for Petitioner.

STATE OF PENNSYLVANIA,
County of Bedford, ss:

John N. Minnich, being duly sworn says that he is the petitioner, and that the allegations of this petition are true, as he verily believes.

JOHN N. MINNICH.

Subscribed and sworn to this 4th day of December, 1933, before me.

[SEAL.] D. CRESS REILEY,
Notary Public.

My commission expires March 4, 1937.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 669

JOHN N. MINNICH, PETITIONER.

vs.

RUSSELL GARDNER ET AL., INTERVENING CREDITOR, AND D. C. REILEY, ESQ., TRUSTEE OF KING MOTOR COMPANY, BANKRUPT, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Reference to Opinions Below.

The petitioner in this case seeks review of a judgment of the Circuit Court of Appeals for the Third Circuit in John N. Minnich *vs.* Russell Gardner, *et al.*, Intervening Creditors, and D. C. Reiley, Esq., Trustee of King Motor Co., Bankrupt, affirming a judgment of the United States District Court for the Western District of Pennsylvania. The district court filed no opinion, but the decree of said Court is found in the Transcript of Record at page 46. The opinion of the Circuit Court of Appeals is reported, 66 F. (2d) 561 (R. 51).

Statement of Grounds of Jurisdiction Invoked.

The judgrment of said circuit court of appeals sought to be reviewed was rendered July 12, 1933, (R. 58). A peti-

tion for rehearing was filed August 2, 1933, and was denied October 2, 1933 (R. 59). In the Circuit Court of Appeals, as well as in the District Court, the petitioner claimed to be entitled to a lien upon certain personal property by virtue of a levy more than four months prior to the filing of the petition in bankruptcy (R. 45, 47).

The petitioner's lien had been recognized and allowed by the Referee in Bankruptcy (R. 12-21). It was disallowed by the district court (R. 46), and the judgment of the district court was affirmed by the circuit court of appeals (R. 51).

The jurisdiction is invoked under Section 240 (*a*) of the Judicial Code, as amended by the Act of February 13, 1925, U. S. Code, Title 28, Sec. 347.

Statement of the Case.

A full statement of the facts necessary to an understanding of this case has been made in the petition in the numbered paragraphs 1 to 14, and in the interest of brevity the statement is not repeated at this point.

Specification of Error.

The errors asserted and intended to be urged in this Court are as follows:

1. The affirmance of the circuit court of appeals of the judgment of the district court disallowing the petitioner's claim to a lien for $1,776.17, the value of the personal property levied upon by the sheriff more than four months prior to the filing of the petition in bankruptcy.

2. The learned Circuit Court of Appeals for the Third Circuit erred in failing to find and hold that petitioner's lien was not extinguished as against the defendant, and on directions to proceed with the sale its right to priority was revived as against any subsequently acquired liens.

3. The learned Circuit Court of Appeals for the Third Circuit erred in failing to find and hold that petitioner's lien had been acquired more than four months prior to, and, though dormant, had been revived nine days before, the filing of the petition in bankruptcy and was effective against the trustee in bankruptcy.

ARGUMENT.

Summary.

Under the law of Pennsylvania, the petitioner's lien, if the levy was made solely for the purpose of acquiring a lien and without a genuine intention of proceeding promptly with the collection of his debt, was good against the defendant in the execution from the date of the issuing of the execution to the date of the filing of the petition in bankruptcy.

Under the law of Pennsylvania, petitioner's lien was dormant.

Under the law of Pennsylvania, if petitioner's lien had become dormant by delay in proceeding, the instructions given by him to the sheriff to proceed and the positive action taken by the sheriff in advertising the sale before the filing of the petition in bankruptcy revived its priority, and it was effective against the trustee in bankruptcy.

A lien created more than four months prior to the filing of the petition in bankruptcy is not avoided by the Bankruptcy Act.

The judgment of the circuit court of appeals is in conflict with applicable local decisions.

The judgment of the circuit court of appeals is in conflict with the decisions of other federal courts.

Under the Law of Pennsylvania, the Petitioner's Lien, if the Levy Was Made Solely for the Purpose of Acquiring a Lien and Without a Genuine Intention of Proceed-

ing Promptly With the Collection of His Debt, Was Good as Against the Defendant in the Execution from the Date of the Issuing of the Execution to the Date of the Filing of the Petition in Bankruptcy.

Accepting the conclusions of the circuit court to be true that "the lien claimant here, made his levy solely for the purpose of acquiring a lien and without a genuine intention of proceeding promptly for the collection of his debt," nevertheless the petitioner's lien was good as against the defendant in the execution.

The courts of Pennsylvania so hold:

In *Kent, Santee & Co.'s Appeal*, 87 Pa. 165, p. 167, the Supreme Court of Pennsylvania held:

> "The law does not favor an execution for the mere purpose of a lien. There is a line of cases which hold that instructions to the sheriff to stay proceedings, or not to proceed upon an execution, or which indicate that it was issued not for the purpose of levy and sale, but for the purpose of lien, and to acquire security for the debt, will destroy the lien as to purchasers and subsequent execution creditors: * * * (*quoting cases*) * * * *This is a matter, however, of which the defendant cannot complain. The execution in such cases is good against him. It is postponed only as to purchasers and subsequent execution creditors.*" (Italics ours.)

A levy upon personal property made by virtue of a fi. fa. before the return day of the writ will support a sale of the property held upwards of eight years afterwards, *Lewis* v. *Smith*, 2 Sergeant & Rawle (Pa.) 142, at 159 and 165. Where goods levied on have not been removed by the sheriff, though they remain unsold above two years, the plaintiff does not lose his lien. *Perit* v. *Willis*, 2 Yeates (Pa.) 524. *Keyser's Appeal*, 13 Pa. 409, was a case wherein the first execution creditor directed that a store, upon the stock

of which the sheriff had levied, should be left open and goods sold by a clerk, and while this state of facts continued other executions were subsequently issued. In the distribution, the court directed the money first to be paid to the subsequent executions, and the balance, if any, to be paid to the first execution.

In *McLaughlin* v. *McLaughlin*, 85 Pa. 317, at 322, Mr. Justice Woodward, speaking for the Supreme Court of Pennsylvania, said:

> "Even a stay of proceeding on a writ levied on personal property, does not involve the loss of the lien, and does not affect the plaintiff's right against the defendant or the goods, although it exposes him to the risk of having his execution postponed."

Levies made upon writs on September 11, 1891, would be sufficient as against the defendant to support writs of *venditioni exponas* issued on March 3, 1893, a period of over seventeen months, *Sweet* v. *Williams*, 162 Pa. 94, p. 100. Where an execution was issued July 10, 1894, and the sale stayed by the plaintiff until March, 1895, over seven months, the court said: "Were the liens lost? Certainly not as against the defendant in the judgment * * *", *Gillespie* v. *Keating*, 180 Pa. 151, p. 155. Directions given by an execution creditor to stay all further proceeding on his execution, until further directions, is a waiver of his priority in favor of a second execution received by the sheriff *during the continuance of the stay: Metz* v. *Hamman*, 5 Wharton (Pa.), 150. Also see *Morrison's Appeal*, 1 Pa. 13.

> "A direction to delay proceedings upon a writ of fieri facias, or any act evincing an intention not to have a sale of the property but to hold the writ for purpose of lien, is a waiver of priority in favor of another writ coming into the hands of the sheriff *in the*

meantime." Syllabus: Appeal of Stroudsburg Bank, 126 Pa. 523. (Italics ours.)

The latest expression of the Pennsylvania courts was on October 2, 1933, when Judge Parker, in speaking for the Superior Court in *Geha* v. *Baltimore Life Insurance Co.*, 168 A. 527, at 528, said:

> "It is true that one may not hold a lien by virtue of an execution to the detriment of other creditors, but this does not mean that the writ is void."

General Law—Delay in executing writ:

In 23 C. J., p. 513-514, Sec. 368 (*a*), the law is stated as follows:

> "If plaintiff delivers an execution to the sheriff with a direction not to levy at all, or until further orders, or to levy and hold without sale, or if similar orders are given after delivery or after the levy, it creates no lien on defendant's property as against a creditor issuing and proceeding with a subsequent execution, or as against bona fide purchasers or other lien holders. * * * *But as against the defendant in the execution or his personal representatives or heirs, the mere suspension of the execution will not affect the lien.*" (Italics ours.)

And in Freeman on Executions, Vol. 2, sec. 206, p. 1043:

> "But as against the defendant in execution or his personal representatives or heirs or others not acquiring rights or liens, the mere suspension of the execution has no effect on its lien."

United States Courts so holding:

In re Zeis, 245 Fed. 737; *Crane* v. *Penney*, 2 Fed. 187.

Courts of other States which so hold:

Keel v. *Larkin*, 72 Ala. 493; *Dryer* v. *Graham*, 58 Ala. 623; *Weldon* v. *Rogers*, 157 Cal. 410; *Terry* v.

Americus Bank, 77 Ga. 528; *Griffin* v. *Wallace*, 66 Ind. 410; *Locke* v. *Coleman*, 2 T. B. Mon. (Ky.) 12; *Hurlbutt* v. *Currier*, 68 N. H. 94; *Peck* v. *Tiffany*, 2 N. Y. 451; *Richards* v. *Allen*, 3 E. D. Smith (N. Y.) 399; *Arrington* v. *Sledge*, 12 N. C. 359.

Under the Law of Pennsylvania Petitioner's Lien was Dormant

The long delay of seventeen months, apparently acquiesced in by the petitioner, would be such a course of conduct having the same effect as if instructions had been given not to proceed, 23 C. J., Sec. 368, p. 515, and the execution would be considered as dormant.

In *Eberle* v. *Mayer*, 1 Rawle (Pa.) 366, at 369, the court said;

> "Where goods were left with plaintiff (that was not fraud per se) but instructions given not to proceed until further direction was, 'of itself, a waiver of his priority, in favor of a second execution, received by the sheriff during the pendency of the stay; in other words, that by the order, the plaintiff's execution must be considered as dormant, * * *."

The petitioner's lien, though dormant, was good as against the defendant in the execution from the date of its issue March 26, 1929, to the date of the filing of the petition in bankruptcy, during the period of dormancy it was liable to be postponed to any subsequent execution which might have come into the hands of the sheriff or to a petition in bankruptcy if one should have been filed while the lien was dormant.

Under the Law of Pennsylvania, if Petitioner's Lien had Become Dormant by Delay in Proceeding, the Instructions Given by Him to the Sheriff to Proceed and the Positive Action Taken by the Sheriff in Advertising the Sale Before the Filing of the Petition in Bankruptcy Revived Its Priority and It Was Effective Against the Trustee in Bankruptcy.

When an execution has become dormant by a perversion of the writ, if, before any subsequent execution has come into the hands of the sheriff, the execution creditor orders the sheriff to proceed, the lien is safe.

In Pennsylvania, the rule as to revival of a dormant lien is clearly expressed in the language of Sharswood, P. J., in *Deacon v. Gorett*, 4 Phila. (Pa.) 7, as follows:

> "Upon the question of priority between execution creditors, where the first execution creditor has instructed the sheriff not to proceed, or has given no instructions, the cases are legion a whole volume might be written to reconcile them. We think, however, that one thing is or ought to be clear, that whatever laches an execution creditor may have been guilty of, if, before any subsequent execution has come to the hands of the sheriff, he wakes up and orders the sheriff to proceed, he is safe."

If a writ clearly issued merely as a security, and the creditor can prove affirmatively that orders to proceed were given before a subsequent writ is received by the sheriff, the first writ still has priority. See *Freeburg's Appeal*, 40 Pa. 244.

General Law—Effect of subsequent instructions to execute writ where the execution creditor has once lost his priority of lien by a perversion of the writ:

In 23 *C. J.* Sec. 368, p. 515, the law is given as follows:

> " " " such instructions will revive his execution, and give priority from the time the instructions were

given, as against creditors acquiring liens subsequent to such instructions."

And in *Freeman on Executions*, Vol. 2, Sec. 206, p. 1043:

> "If the plaintiff, after stay or suspending its execution, direct the officer to proceed, the lien will be revived and made paramount to all writs received by the officer after such direction to proceed."

United States Courts so holding:

In re Zeis, 245 Fed. 737;
In re Schwab Printing Co., 59 F. (2d) 726;
In re Gulport Furniture Co., 4 F. Supp. 489.

Courts of other states which so hold:

Sparre v. *Abbott*, 40 Ill. A. 646;
Miller v. *Kosch*, 74 Hun. (N. Y.) 50, 26 N. Y. S. 183.

From these decisions of the courts of Pennsylvania, supported by general law and the decisions of other courts, it is manifest that even if we assume that the petitioner's execution had been clearly issued as a lien and had become dormant from lapse of time, nevertheless it was, as against the defendant in execution, good during the whole period from March 26, 1929, the date the execution was issued, to August 30, 1930, the date of the filing of the petition in bankruptcy.

And further assuming it to have become dormant, it was, by the directions given to the sheriff to proceed with the sale and by the positive action taken by the sheriff, revived nine days prior to the filing of the petition in bankruptcy.

Adopting the following from *In re Zeis*, *supra*, as if they were our own words:

> "Unless, therefore, it can be said that the trustee acquired the rights or status of a bona fide purchaser or junior execution creditor during the time the proceedings were suspended, the lien is good as against

him, and must be recognized by the bankruptcy court. It is clear that a trustee in bankruptcy is not a bona fide purchaser. *Zartman* v. *First National Bank*, 216 U. S. 134, 138. And also it is settled that the trustee occupies the position of a creditor with an execution issued and levied upon the date of the filing of the petition in bankruptcy, and not earlier. *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 269.

"The revival arising from an instruction to proceed was not the revival of the lien, but a revival of the priority of the lien. No new lien was created, which would be void because within the four months' period under section 67 *f* of the Bankruptcy Act. When an execution is deemed to be dormant, it simply means that the lien has lost its priority in favor of another execution or person acquiring certain rights during the period of dormancy. The lien as such, which is the right to satisfy the debt out of the property levied upon, still remains. The property is still charged with that lien while the execution of the writ is suspended: the only difference being that other executions, etc., may come in and fasten on the property and be satisfied first. If the property is sold under such circumstances, while the later executions may successfully claim to be satisfied ahead of the one which became dormant, the so-called dormant execution will be paid out of any surplus remaining after the satisfaction of the others. That is all that has ever been held to result from a dormancy, so-called."

We submit that *Platt-Barber Co.* v. *Groves*, 193 Pa. 475, the only case cited by the circuit court of appeals, is a case dealing with a senior and junior execution and discusses only the general law of Pennsylvania as to the postponement of liens. The question of the revival of a dormant lien is not considered therein. Furthermore, Mr. Justice Mitchell does not say that a perverted lien is void as to everyone, he merely holds it to be postponed to subsequent levies.

The case of *Freeburg's Appeal, supra*, is authority for the doctrine that even if the writ issued clearly for a lien, yet if the creditor can prove affirmatively that orders to proceed were given the sheriff before any subsequent writ was received by him, the first writ still has priority. Assuming that petitioner's execution was issued clearly for a lien, the fact has been affirmatively proven that the sheriff was ordered to proceed (R. 14, 20, 29) and did proceed (R. 14, 20, 29, 38) before the filing of the petition in bankruptcy (R. 1)—which is the same as if the trustee in bankruptcy had issued an execution on the date of filing the petition. The circuit court of appeals in its opinion finds every fact necessary to revive the lien of the petitioner and give its priority to the bankruptcy proceedings. Quoting from the court's opinion: "On August 21, 1930, the appellant instructed the sheriff to advertise the goods of the King Motor Company for sale and to sell the same immediately" (R. 52). "The sheriff advertised on August 21, 1930" (R. 52). "On August 30, 1930, an involuntary petition in bankruptcy was filed against the King Motor Company" (R. 52). We respectfully submit that we cannot understand how the circuit court could seemingly overrule the law as laid down by the Supreme Court of Pennsylvania.

A Lien Created More Than Four Months Prior to the Filing of the Petition in Bankruptcy is not Avoided by the Bankruptcy Act.

The circuit court of appeals in its opinion states: "He postponed all action until such time as the debtor was obviously insolvent and within four months of bankruptcy" (R. 53). Insolvency has no bearing on the case. The lien was obtained on March 26, 1929 (R. 32), seventeen months prior to the filing of the petition in bankruptcy on August 30, 1930 (R. 1). In order to be affected by the provisions

of the Bankruptcy Act a lien obtained in legal proceedings must have been acquired within the four months immediately preceding the filing of the petition in bankruptcy. See *Metcalf* v. *Barker*, 187 U. S. 165.

The recognition of the petitioner's lien does not violate, in any way, either the letter or spirit of the bankruptcy law. In *Straton* v. *New*, 283 U. S. 318, the doctrine is recognized that, while the bankruptcy law contains no express provision for preserving liens acquired by legal proceedings more than four months before the petition is filed, it is clearly implied that they shall be saved from the operation of the law, for Section 67-*f* (U. S. C. A., Sec. 107 (*f*)) voids only liens obtained by legal proceedings within the four month period. It follows from this that those liens acquired through legal proceedings more than four months prior to the filing of the petition, if valid under state law, are preserved and "will be accorded priority by the bankruptcy court in distribution of the estate in accordance with the applicable local law." And as was said by this Court in *Metcalf* v. *Barker*, *supra*:

> "It is the lien created by a levy * * * that is invalid, and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed null and void on adjudication, but its validity is recognized, * * * A judgment or decree in enforcement of an otherwise valid preexisting lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens."

Petitioner's lien was acquired more than four months prior to the filing of the petition. No new liens were created by the issuing of the vendices. *A vend. ex.* in Pennsylvania is simply a writ under which the sheriff sells by virtue of the levy on a previous writ. See *Neil* v. *Colwell*,

66 Pa. 216; *McLanahan v. Goodman*, 265 Pa. 43. The instructions to the sheriff to sell (R. 14, 20, 29) and his advertisement of the sale (R. 14, 20, 29, 38), did not create a new lien. These positive acts only revived the *priority* of the lien which already existed—the revival was not of the lien but of its *priority*, and dated back to the time the execution became a lien on March 26, 1929. See *In re Zeis*, 245 Fed. 737.

In re Schwab Printing Co., decided June 25, 1932, in the United States Circuit Court of Appeals, Seventh Circuit, 59 F. (2d) 726, is substantially similar to the case now before the court. In that case an execution had been issued and was dormant for a period of five months, after which positive action was taken and the goods advertised for sale. Three days after the advertising of the goods for sale by the sheriff an involuntary petition in bankruptcy was filed. It was held that the lien of a dormant levy may have its priority revived by a positive act indicating a purpose to make the levy effective. And a judgment debtor's trustee in bankruptcy takes personalty subject to the lien of the execution levy, notwithstanding the delay in proceedings to realize thereon, where the property was advertised for sale prior to bankruptcy. Judge Alschuler, in speaking for the court, says:

> "But if appellee's lien did become dormant through delay in causing sheriff to proceed to sale thereunder, it ceased to be dormant when positive action was taken looking toward its assertion and the sale of the chattels levied on. This occurred * * * when the sheriff advertised for sale the press and folding machine under the Butler execution. The lien of a levy which has become dormant may have its priority revived by a positive act indicating a purpose and undertaking to make it effective, and this will relate back to the time the judgment became a lien. *Metcalf v. Barker*, 187 U. S. 165, 23 S. Ct. 47 L. Ed. 122;

Straton v. *New*, 283 U. S. 318, 51 S. Ct. 465, 75 L. Ed. 1060; *In re Zeis, supra* (245 F. 737).

"When, therefore, the bankruptcy intervened, the lien of this levy, even though dormant through delay in the proceeding to realize on the property levied upon, had been revived three days before the bankruptcy, when the property was in process of being sold under the levy. The trustee, therefore, taking under the rights of an execution creditor as of the date of filing of the petition in bankruptcy (*Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268, 26 S. Ct. 50, 60 L. Ed. 275; *Zartman* v. *First National Bank of Waterloo*, 216 U. S. 134, 30 S. Ct. 368, 54 L. Ed. 418; *In re Zeis, supra*), took the property in question subject to appellee's lien thereon existing for more than four months before."

The counsel for the wage claimants has continually referred to "The gross injustice which would have resulted to the wage claimants if the referee's decree of distribution had been allowed to stand." True it is under Pennsylvania law the wage claimants would have had a priority claim to the amount of $200 each, ahead of the execution creditor if the proceeding had been maintained in the state court. The wage claimants were the parties who removed the proceedings into the bankruptcy courts, they were the petitioners for the involuntary bankruptcy against the debtor. They could have perfected their right in the state court before filing the involuntary petition in bankruptcy by the filing of their claims with the sheriff or receiver. This they did not choose to do and now have no ground for complaint.

The Judgment of the Circuit Court of Appeals is in Conflict With Applicable Local Decisions.

The decisions which have been hereinbefore cited appear clearly to establish that under the law of Pennsyl-

vania circumstances which indicate an execution was issued not for purpose of levy and sale but for the purpose of a lien and to acquire security for the debt does not invalidate the lien against the defendant in the execution, it is postponed only as to purchases and subsequent execution creditors whose writs come into the hands of the sheriff while the delay continues. And when a lien is dormant, instructions to proceed revives the priority of the lien from the time the instructions are given, as against creditors acquiring liens subsequent to the instructions to proceed. The decision of the circuit court of appeals in this case conflicts with the applicable local decisions. The question of local law involved is important as affecting transactions of people not only of this state but all states which do not have a statute of limitations upon this subject.

The Judgment of the Circuit Court of Appeals is in Conflict With the Decisions of Other Federal Courts.

The ruling below also conflicts with the decisions of other Federal courts. The revival of the priority of dormant liens has been recognized as effective against the trustee in bankruptcy. *In re Zeis*, 245 Fed. 737 (C. C. A. 2); *In re Schwab Printing Co.*, 59 F. (2d) 726 (C. C. A. 7); *In re Gulport Furniture Co.*, 1 F. Supp. 489 (D. C. Miss.). Although these cases were cited below, on brief, by petitioner, the circuit court of appeals makes no mention of them in its opinion.

For this Court's consideration and comparison, the facts of the case at bar are briefly:

Execution lien dormant almost seventeen months during which time five *rend. ex.* were issued, no agreement or interference by creditor but implied consent to the delay by lapse of time. Sheriff directed to sell and advertised nine days before petition in bankruptcy was filed.

The facts of *In re Zeis, supra*, condensed are as follows:

Execution lien dormant almost five months during which time the sale was advertised and postponed many times with the consent of execution creditor. Sheriff directed to sell and advertised six days before petition in bankruptcy was filed.

The ruling of *In re Zeis, supra*, from the syllabus:

> "Where an execution becomes dormant after levy, by reason of instructions to the officer not to sell, it loses its priority of lien as against later levies or other liens acquired during the period of dormancy; but its lien is not extinguished as against the defendant, and on directions to proceed with the sale its right to priority is revived as against any subsequently acquired liens.
>
> "A trustee occupies the position of a creditor with an execution issued and levied on the date of the filing of the petition in bankruptcy, but at no earlier date; and where an execution levied more than four months prior to such date had been allowed to become dormant by successive postponements of the sale with the consent of the plaintiff, but had been revived by orders to sell on a fixed date, the lien of the levy was effective against subsequent proceedings in bankruptcy against the defendant."

In re Zeis, supra, arose from New York, a state wherein the local law of execution liens does not differ from that of Pennsylvania. In both states the Statute of 13 Eliz. c. 5 is in effect and the basis for all the decisions dealing with the postponement of liens. In neither state has your petitioner been able to find nor have adverse counsel cited a decision which holds that delay or instructions not to proceed renders an execution void as against the defendant in the writ. Numerous decisions have been examined,

including those cited by counsel, and all are in accord that in case of delay or instructions not to proceed, the creditor only loses his preference and is postponed to subsequent execution creditors whose writs come into the hands of the sheriff during the delay or stay. In the case at bar no subsequent execution was issued, no receiver was appointed, and no petition in bankruptcy was filed during the delay just as in *In re Zeis, supra*, the petition in bankruptcy was not filed until after the priority of the petitioner's lien had been revived.

The diversity of ruling between the case at bar and that of *In re Zeis, supra*, and the other cases cited emphasizes the necessity for the issuance of the writ sought in this case to the end that the correct rule may be declared by this Court.

Respectfully submitted,

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